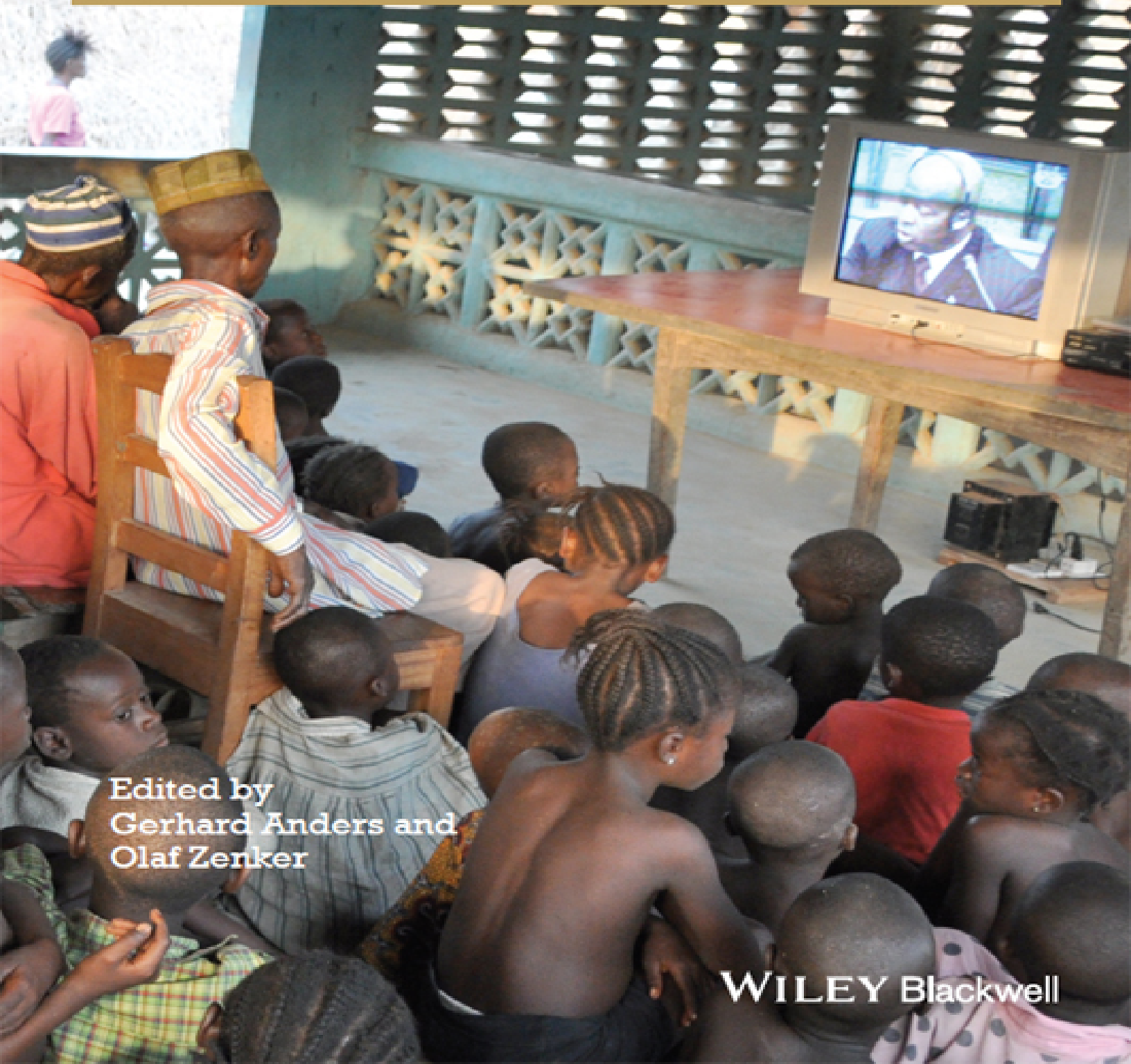# TRANSITION AND JUSTICE

NEGOTIATING THE TERMS OF NEW BEGINNINGS IN AFRICA

Edited by
Gerhard Anders and
Olaf Zenker

WILEY Blackwell

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Contents

List of Illustrations

Figure 5 Both the ANC-run Free State and the DA-run Western Cape provincial governments were embarrassed by media coverage of open toilets in the run-up to the 2011 local government elections. Reproduced by kind permission. Copyright 2010--2011 Zapiro / www.zapiro.com (all rights reserved).

Figure 6 In June 2010, the South African Human Rights Commission (SAHRC) released a report finding that the open toilets constructed by the DA-run local government in Makhaza informal settlement in Khayelitsha were an affront to the dignity of residents living there. Zapiro's cartoon has Mayor Zille being issued with the HRC finding. Reproduced by kind permission. Copyright 2010--2011 Zapiro / www.zapiro.com (all rights reserved). This ruling was followed by another SAHRC Report, released in July 2014, focusing on the controversial rolling out of portable chemical flush toilets ("porta potties") in Cape Town's informal settlements. The 2014 SAHRC report found that portable toilets violated the residents' rights to equality, human dignity and privacy, and that the sanitation conditions, services and infrastructure were racially discriminatory against black Africans. The report was the outcome of a SJC social audit and complaint made to the HRC by the SJC about the conditions of portable chemical toilets in Khayelitsha.

Figure 7 A poster produced in 2011 by the Social Justice Coalition (SJC), a social movement working on sanitation issues in the informal settlements of Khayelitisha. It was designed for a toilet queue protest that sought to draw attention to the stark disparities between sanitation resources in affluent

and poor parts of the city. The media coverage of the protests and persistent activism ultimately convinced the city government to establish a janitorial system to monitor and maintain toilets in Cape Town's informal settlements.

Figure 8 Portable flush toilet protests in June 2014 in Kosovo informal settlement in Cape Town, where residents destroyed "porta potty" toilets that they claimed violated their human rights and dignity.

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Movements and Popular Politics (2008); *Limits to Liberation After Apartheid: Citizenship, Governance and Culture* (2005) and *New South African Keywords* (2008, with Nick Shepherd).

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1
Transition and Justice: An Introduction

Gerhard Anders and Olaf Zenker

INTRODUCTION

Since the end of the Cold War, political new beginnings have increasingly been linked to questions of transitional justice. This can also be observed in Africa. Since the establishment of the South African Truth and Reconciliation Commission (TRC) and the International Criminal Tribunal for Rwanda (ICTR) during the mid-1990s, the African continent has loomed large in academic and political debates about how to deal with past injustices and realize political transition. The contributions to this collection examine a series of cases where peaceful 'new beginnings' have been declared after periods of violence and where transitional justice institutions played a role in defining justice and the new socio-political order.

In spite of the dramatic growth of transitional justice, there are other sites in countries and regions affected by violence and armed conflicts where ideas about justice, reconciliation, retribution and political participation are being instantiated and contested. Among the sites explored in this edited volume are re-education camps for demobilized combatants, refugee camps and prisons, as well as domestic courts, parliaments and village meetings. In these sites, former combatants and their leaders, politicians, civil society activists, village elders and ordinary people advance their views on how to realize

justice or seek to secure a place in the new political system. Such negotiations of the terms of new beginnings in Africa, in which transitional justice measures are only one aspect of — and often challenged by — a multitude of much broader societal attempts at realizing more 'justice', constitute the subject matter of this collection. It is aimed at furthering our knowledge about transition and justice, including and transcending the usual transitional justice mechanisms, by presenting fine-grained case studies of sites where claims to justice are advanced and contested.

The focus on Africa in this edited volume is not accidental. Since the establishment of the TRC in South Africa and the ICTR in Arusha, Tanzania, the African continent has turned into a veritable laboratory of transitional justice. The International Criminal Court (ICC), the first permanent international criminal tribunal in history, has focused almost exclusively on Africa. At the time of writing, in March 2014, investigations or trials against accused from eight African countries have been opened at the ICC. This has attracted considerable criticism from various quarters, especially in Africa, where some see the ICC as a thinly veiled instrument of neo-colonialism. The advent of this critique is directly linked to the expansion of transitional justice mechanisms in post-conflict situations in African countries characterized by fragile state institutions, widespread poverty and considerable internal fragmentation due to ethnicity and regionalism. In Sierra Leone, for instance, no less than four transitional justice mechanisms (amnesty, truth commission, international tribunal and domestic criminal trials) co-existed in often uneasy relationships, as Gerhard Anders describes in his chapter. In Uganda, a similar pluralism of transitional justice institutions can be observed, as Adam Branch and Kimberley Armstrong show in their contributions. Uganda and Rwanda are of particular interest as these countries

have experienced the most sustained efforts to create alternative transitional justice mechanisms more attuned to local culture and conceptions of justice.

In contradistinction to Latin America, where transitional justice was one of the means to address human rights violations by authoritarian military regimes, transitional justice in Africa with the exception of South Africa has focused on efforts to end violent conflicts and civil wars in societies characterized by the absence of a strong state apparatus and a plurality of de facto sovereign political and military groups. The growing importance of transitional justice in international efforts to pacify volatile regions affected by civil war has resulted in a growing convergence of international peacebuilding, development and transitional justice mechanisms (de Greiff and Duthie, 2009; Mani, 2008; UN, 2004). The interventions of foreign actors such as the United Nations or donor countries promoting transitional justice institutions as part of much larger military-humanitarian interventions have resulted in complex relationships with state institutions and locally operating groups. This variety and complexity is not matched by other regions and allows the comparison of different debates about transition and justice both across Africa and within specific countries. Due to this complexity and variety, the African experiences can shed light on debates about transitional justice and new beginnings elsewhere. Put differently, given that 'Africa' is often treated as a prime location for putting transitional justice into practice, African case studies seem particularly suited to decentre such approaches and to refocus on broader attempts at bringing about transition and justice.

The chapters in this edited volume cover a wide range of situations, putting an emphasis on either explicit 'transitional justice' mechanisms in the context of broader negotiations of justice and transition, or on the multifarious

ways in which debates about new beginnings speak to lessons to be learnt for 'transitional justice'. In this sense, the first set of chapters aims at destabilizing the emphasis on transitional justice institutions in the analysis of new beginnings in Africa by studying other sites where past injustices are addressed. The second set contextualizes transitional justice mechanisms, situating them in relation to conflicts and negotiations about the past and the future. Widening the scope and including other sites of contestation will benefit the social-scientific study of political change and attempts to come to terms with past injustices in Africa and elsewhere. By transcending the narrow focus on institutions this edited volume seeks to address fundamental questions about transitions and justice in societies characterized by a high degree of external involvement and internal fragmentation.

We contend that the new beginnings examined in this collection are shaped by two inter-related dialectics. The first is the discrepancy between lofty promises of justice issued by lawyers, commissioners, diplomats and politicians, and the messy realities on the ground and within the institutions themselves, where the official narrative is constantly invoked and challenged by people's everyday actions. The second is the dialectic between the logics of exception, on the one hand, and the ordinary or normal, on the other hand. Re-education camps, repatriation of refugees, land restitution claims, truth commissions and war crimes trials are by no means ordinary measures; they are justified by an emergency or other exceptional circumstances. Yet there is no evidence for consensus on this, as the case studies in this collection show. In fact, there are groups and individuals who make a case for continuity by denying the extraordinary character of a situation and insisting on doing business as usual.

These dialectics, and how they play out during political new beginnings, have not been addressed by the current debate on localizing transitional justice, as the literature review in part one of this Introduction shows. The second part of the Introduction discusses the problem of new beginnings, the paradox of legitimizing a new social-political order that seeks a break with the laws and mores of the past. The third part outlines the importance of the discrepancies between lofty promises of justice and messy realities in the context of new beginnings, while the fourth examines the significance of the dialectics between logics of the exceptional and the ordinary or normal for a more comprehensive understanding of justice that transcends transitional justice as a field of study.

APPROACHING TRANSITIONAL JUSTICE: STATE OF THE ART

Transitional justice became an interdisciplinary field in its own right at the turn of the twenty-first century and has given rise to a burgeoning body of literature. Scholars from a range of disciplines including social and cultural anthropology, political science, theology and legal studies, as well as practitioners and activists, have focused on the analysis and development of institutions and processes including truth commissions, criminal prosecution, amnesty and reparations (Arthur, 2009; Bell, 2009). According to a widely quoted definition by former UN Secretary-General Kofi Annan, transitional justice comprises:

the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. (UN, 2004: 4)

During the 1980s and the 1990s, democratically elected governments replaced military regimes across Latin America. This resulted in heated debates about how to address the human rights violations committed under military rule. In Argentina, Chile and El Salvador, truth commissions were established to signify a new, democratic beginning. These institutions had the task to throw light on the fate of tens of thousands of suspected dissidents who had 'disappeared' under military rule and to produce an authoritative historical record. Truth commissions were advanced as an alternative to amnesty provisions passed by the military rulers before relinquishing power, on the one hand, and criminal prosecutions, seen as threatening the stability of the new democracies, on the other. The first transitional justice studies were a direct response to these discussions about the merits and disadvantages of the various institutions set up to deal with the human rights violations of the military regimes in Latin America. During the 1990s, the first systematic studies under the newly coined term 'transitional justice' were published, discussing possible solutions to the problem of how to come to terms with a violent past (Cohen, 1995; Kritz, 1995; Orentlicher, 1991).

In its formative years, transitional justice was mainly seen as a tool that could be employed to effect a transition to democracy and adequately deal with past injustices

regardless of the specific socio-cultural context. The field was dominated by legal scholars and political scientists who adopted a model of legal and political reform to be employed during a transitional period from autocratic rule to democracy. This reflected a broader shift during the 1980s and 1990s, away from the emphasis placed by modernization theory and Marxism on socio-economic structures (Arthur, 2009: 337–8). Instead, the quickly expanding transnational human rights movement advanced individual rights and political liberalism as the main drivers of progress. Authors like Bass (2000), Minow (1998) and Teitel (2000, 2003) legitimized the new concept of transitional justice by tracing it to the Nuremberg Trials and other trials against perpetrators of war crimes and the holocaust after World War II, although the term itself was not coined until the 1990s, as Arthur (2009) points out.

This shift is particularly striking with regard to Africa where, during the 1960s and 1970s, socio-economic structural transformation was seen as key in overcoming the legacy of colonialism. After the wave of democratization of the 1990s, when many countries across Africa introduced multi-party democracy, political liberalism and the belief in the potential of the free market became the principal paradigms in sub-Saharan Africa. The international financial institutions and the Western donor community welcomed the vision of individual rights and agency underlying both liberalism and capitalism, and vigorously promoted democracy, human rights and good governance. Transitional justice, also informed by a liberal belief in the transformative power of individual rights, became a key part of international humanitarian and development interventions and of national projects with the goal of realizing democracy, human rights and the rule of law.

On how to achieve these objectives, opinions have been divided. At one end of the spectrum are those who deem compromises necessary to maintain peace. At the other end are those who maintain that the punishment of perpetrators is the only credible means of achieving justice. This debate, known as peace versus justice, has shaped transitional justice for a long time. In this context, truth commissions were advanced as a compromise between amnesty and criminal prosecutions, creating a form of accountability but refraining from the punishment of perpetrators (Rotberg and Thompson, 2000; van Zyl, 1999). Recent studies have attempted to transcend the stark opposition between peace and justice by advocating a mix of several institutions including truth commissions and various forms of community justice, as well as criminal trials at national and international courts (Roht-Arriaza and Mariezcurrena, 2006; Sriram and Pillay, 2009).

The question of whether truth commissions or criminal trials are better suited to deal with past injustices has been partly eclipsed by the recent debate about localizing transitional justice. The idea that transitional justice institutions need to be adapted to socio-cultural specificities reflects growing doubts about the universalism of transitional justice, the ability to aid the establishment of liberal democracy in any socio-cultural setting. This universalistic outlook is mainly due to the influence of political science and law, the principal academic disciplines defining the field (Arthur, 2009; Bell, 2009).

The universality of the institutions and the objectives of transitional justice have come under critical scrutiny by a growing body of scholarship. Especially anthropologists, with their keen eye for the specificities of place and cultural difference, have been at the forefront of this critique. Wilson's (2001) anthropology of the South African TRC is one of the first examples of this approach. His book

questions two basic assumptions informing the establishment of the TRC in South Africa. The first concerns the vision of a truly multicultural, non-nationalist constitutionalism after the end of apartheid based on universal human rights — a new culture not refracted by ethnicity, communalism or nationalism. The second was the idea of the existence of a unified concept of African restorative justice aimed at national reconciliation shared by all South Africans. By contrast, Wilson's ethnographic evidence shows how 'human rights talk is enmeshed in culturalist discourses on community and becomes an integral part of nation-building' (Wilson, 2001: 17). According to him, the ultimate objectives of the TRC process were the strengthening of the state's bureaucracy and legal system (ibid.) rather than realizing restorative justice and national reconciliation. He further shows that perceptions of restorative justice and reconciliation as cornerstones of the new constitutionalist national identity were by no means shared by all South Africans, some of whom favoured retributive justice (ibid.: 14–16).

This focus on the people in whose name justice is said to be done and the places where official narratives are challenged both in word and action gained in importance as more research on transitional justice in action was conducted in a number of different countries and institutions. It also became clear that the concept of transitional justice was by no means universal. A number of social-scientific studies have argued that ideas about achieving justice through truth-telling and punishment are rooted in Occidental religious and legal traditions. Research on Rwanda (Barnet, 2008; Buckley-Zistel, 2006; Eltringham, 2004; Thomson, 2011), Uganda (Allen, 2006; Finnström, 2008), South Africa (Ross, 2003) and Sierra Leone (Shaw, 2005, 2007) reveals a wide variety of voices and experiences in the regions affected by large-scale

violence. For instance, Buckley-Zistel (2006) and Shaw (2005, 2007) argue that people in these regions did not share Western conceptions of truth-telling and reconciliation but preferred silence or social forgetting as a way to come to terms with the violent past.

Other studies highlight the diversity of views held by people in the regions affected by violence. Allen's research on northern Uganda (2006) traces the divisions between those preferring amnesty, those who support neo-traditional reconciliation ceremonies and those who demand retributive justice from the ICC. Finnström's (2008) ethnography of the everyday survival of the Acholi people in northern Uganda suggests an even more complex picture defying simplistic accounts of clear divisions between victims and perpetrators as people struggle to come to terms with 'bad surroundings'.

With regard to international criminal justice, several authors adopt a cultural relativist stance similar to Shaw's perspective. For instance, Clarke (2009) and Kelsall (2009) focus on the cultural differences between international criminal justice and African conceptions of justice, truth and fact-finding. Clarke argues that local conceptions of justice and law tend to be at odds with the language of human rights and international criminal law. In his study of the Special Court for Sierra Leone, Kelsall blames the problems encountered by the court on cultural differences between Western law and African culture, arguing that the Special Court failed to appreciate 'different ideas of social space and time, of causation, agency, responsibility, evidence, truth and truth-telling' (Kelsall, 2009: 17) prevalent in Sierra Leone.

Other studies situate international criminal tribunals in relation to international influences and the national political landscape, and trace how the tribunals produce

historical narratives. Anders (2009) situates the Special Court for Sierra Leone in relation to the debate about international criminal justice and the national political arena in Sierra Leone. Hagan et al. (2006) show how US politics affected the prosecutorial strategy at the International Criminal Tribunal for the former Yugoslavia (ICTY). Wilson's (2011) study analyses how various features and dynamics of international criminal justice have shaped the historical accounts produced by the international tribunals. By tracing the various influences, these studies have contributed to a better, empirically more grounded understanding of the development of international criminal justice.

This revisionist scholarship has started to make some impact in the wider field of transitional justice. This is mainly due to the growing body of empirical knowledge about the manifold problems encountered when transitional justice mechanisms have been adapted to different situations and places. Even proponents of transitional justice admit that place matters, as abstract ideals such as reconciliation or justice are constantly contested and questioned by people who seek to engage, or try to avoid, the mechanisms of transitional justice at work (Orentlicher, 2007). In response to these problems, attempts have been made to localize transitional justice by advancing alternative mechanisms. Africa has been spearheading this trend with the *gacaca* courts in Rwanda and supposedly traditional reconciliation ceremonies in northern Uganda. These institutions are presented as drawing on African cultural values and concepts of justice by emphasizing community involvement and reconciliation between perpetrators and victims. Several authors such as Kelsall (2009) support the establishment of these alternative transitional justice mechanisms due to their hybrid and localized character.

Generally, the donor community has hailed these neo-traditional institutions as being more responsive to African values and expectations but a growing number of scholars have advanced a scathing critique. They argue that in fact they do not constitute manifestations of authentic African culture. In Rwanda, international humanitarian activists (Oomen, 2005) and the government (Waldorf, 2010) have promoted the *gacaca* courts as a cheap and quick way of dealing with the large number of *génocidaires*. Clark's (2010) study draws an ambivalent and complex picture of community involvement in the *gacaca* courts, which does not correspond with simplistic ideas about African culture. With regard to Uganda, Branch (2011) criticizes the essentializing culturalism driving supposedly African transitional justice mechanisms, a critique he further develops in his contribution to this collection. The edited volume *Localizing Transitional Justice* (Shaw et al., 2010) exemplifies the critique of the aloofness of transitional justice and the problems surrounding the introduction of supposedly African alternative institutions such as the *gacaca*. In the book's introduction, Shaw and Waldorf suggest adopting a 'place-based' approach to explore the multifaceted encounters between universal transitional justice discourse and 'local practices and priorities' (ibid.: 5). Their empirical evidence on local practices shows how clearly differentiated categories of victim and perpetrator fail to account for complex realities on the ground where people often prefer silence to public displays of truth-telling.

By now, the emphasis on sound empirical knowledge of the local and increasing scepticism towards the efficacy of transitional justice mechanisms are shared by a growing group of scholars in the field of transitional justice (Bell, 2009; Orentlicher, 2007; Teitel, 2003; Theidon, 2009). We agree with Shaw and others that local, place-based

empirical evidence is important. Clearly, the emphasis on empirical evidence is sensible from a methodological perspective. However, it runs the risk of reproducing the scalar logic of global, national and local that tends to obscure the multifarious ways in which these scales are being made and re-made in processes of negotiation and contestation. Transcending the mainly methodological concern with scalarity, we deem three issues to be crucial to the understanding of transitional justice in the context of much wider social debates on justice and political change: the problem of 'new beginnings' — the paradox of legitimizing a novelty, of finding a foundation for that which explicitly breaks with the past; the discrepancies between lofty promises and the messy realities of transitional justice in action; and the dialectic between logics of the exception and the ordinary employed to legitimize or resist transitional justice mechanisms.

THE PROBLEM OF NEW BEGINNINGS

New beginnings have often been associated with violence. According to Arendt:

> The relevance of the problem of beginning to the phenomenon of revolution is obvious. That such a beginning must be intimately connected with violence seems to be vouched for by the legendary beginnings of our history as both biblical and classical antiquity report it: Cain slew Abel, and Romulus slew Remus; violence was the beginning and, by the same token, no beginning could be made without using violence, without violating. (Arendt,1990/1963: 20)

In Arendt's seminal analysis, the problem of beginning is key to the understanding of modern revolutions and the violence with which revolutionary change tends to be